

Complainant (Gorham)

v.

Respondent (Willow Grove, Pa.)

I. COMPLAINANT'S CHARGE:

Complainant, alleged that Respondent, terminated his employment because of his physical disability.

II. RESPONDENT'S ANSWER:

Respondent, Inc., denied the allegation of discrimination and said that Complainant was never terminated and that his current status is Leave of Absence due to sickness.

III. JURISDICTIONAL DATA:

- 1) Date(s) of alleged discrimination: 1/03/2008 and 1/04/2008.
- 2) Date complaint filed with the Maine Human Rights Commission: 6/20/2008.
- 3) Respondent employs 321 employees and is subject to the Maine Human Rights Act, the Americans With Disabilities Act, as well as state and federal employment regulations.
- 4) Complainant is represented by William Vickerson, Esq. Respondent is represented by corporate counsel, Phillip Tatoian, Jr., Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and a phone interview.

IV. DEVELOPMENT OF FACTS:

- 1) The parties and issues in this case are as follows:
 - a) The Complainant, began employment for Respondent on March 17, 2007 as a Water Meter Installer. Complainant suffered a heart attack on December 26, 2007 and underwent quadruple bypass surgery on

December 27, 2007. Complainant states he was terminated after his bypass surgery.

- b) The Respondent, provides services to utility companies including the installation, maintenance and reading of utility meters. Its corporate office is based in Pennsylvania. Complainant worked for Respondent in its Westbrook, Maine facility.
 - c) Supervisor 1 is the person who Complainant states confirmed that he had been terminated from employment. Supervisor 2 is another supervisor referenced in this report.
 - d) Complainant alleges that his employment was terminated by letter, dated January 3, 2008 and said termination was effective December 21, 2007.
 - e) Respondent alleges that Complainant was never terminated and that his current status is leave of absence due to sickness. Complainant alleges that Respondent's stated reason is false. He alleges that he was never told that he was on a leave of absence but rather was simply notified of his termination.
- 2) Complainant provides the following regarding his absence from employment and his notification of termination:
- a) He was hired on March 27, 2007. His job title was Water Meter Installer.
 - b) In late November 2007 he asked Supervisor 1 and Supervisor 2 for unpaid leave during the week between Christmas and New Year's Day. That request was granted. He was scheduled to return to work on January 2, 2008.
 - c) On December 26, 2007 he suffered a heart attack and underwent quadruple bypass surgery on December 27, 2007. He had a friend notify Respondent of his heart attack and subsequent surgery.
 - d) He was released from the hospital on December 30, 2007.
 - e) While home recuperating, he received a letter from [Respondent parent company]¹, RESPONDENT's parent company, dated January 3, 2008. It was a COBRA notice that stated his date of separation was December 21, 2007 (the date he began his unpaid leave).

¹ Respondent Inc. states that Complainant was not and has never been an employee of [Respondent parent company]. Respondent is a subsidiary of [Respondent parent company] and as such falls under [Respondent parent company] Group Health Plan. However, Respondent is operated separately from [Respondent parent company].

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- f) A few days later, he received another COBRA letter from [Respondent parent company], dated January 4, 2008, notifying him of the loss of his group health insurance coverage as of December 21, 2007.
 - g) He called Supervisor 1 and asked about the above-mentioned letters. Supervisor 1 informed him that he was all done with the company but told him not to worry because he could still have COBRA benefits.
 - h) He informed Supervisor 1 that he could not afford the Cobra payments.
- 3) Respondent's answers address the above as follows:
- a) Complainant was never terminated and his current status is Leave of Absence. Complainant was an hourly employee and was not eligible for short term or long term disability. Therefore, the only means available to Complainant to continue his benefits was COBRA.
 - b) Complainant was told to contact RESPONDENT once he was cleared to return to work.
 - c) Complainant was able to return to work starting January 15, 2008 but never contacted RESPONDENT for reemployment.
 - d) Complainant is eligible for rehire and may contact RESPONDENT regarding open positions.
- 4) The following information is provided by Supervisor 1:
- a) "Complainant had requested and was granted the week ending December 29, 2007 as unpaid time off." He was notified by a friend of Complainant's of Complainant's heart attack and bypass surgery.
 - b) Complainant contacted him on or about January 2, 2008 stating that he had "no idea" when he would be released to return to work. Complainant said he would let him know when he spoke to his doctor in a few weeks.
 - c) He was advised by the home office benefits administrator to separate Complainant as of his last day worked (December 20, 2007). This was sent into corporate on January 2, 2008. Complainant was hired in March of 2007 and had not been with the company for one year as of that date so he was not eligible for continued health coverage under the company's insurance plan.
 - d) He spoke to Complainant about applying for his COBRA benefits on January 16, 2008 when Complainant came into the office. He also informed Complainant that his job would be available to him whenever he

was released from his doctors. Complainant stated he was unsure if he would ever be physically able to perform the job of Water Meter Installer.

- e) Complainant was not heard from again until he applied for unemployment benefits.
- 5) Complainant responds to the above as follows:
- a) He was never told to contact RESPONDENT once he was cleared to return to work. He was told by Supervisor 1 in a very general tone to keep them informed, however, he never understood that to mean that he was to let them know when he could return to work.
 - b) He was not cleared to return to work on January 15, 2008. He was told that he should not drive until January 15, 2008.
 - c) He did not contact RESPONDENT about returning to work for two reasons: First, it was clear from the paperwork he received and the attitudes of Supervisor 1 and Supervisor 2 that he was done with RESPONDENT and secondly, because he lost his medical benefits, he could not afford to see his physician to get clearance to return to work.
- 6) Complainant provides the following details about visiting the work site in early January 2008:
- a) He dropped by the office in early January. He came in early because he wanted to thank everyone for the flowers they sent him while he was in the hospital. He wanted to see everyone before they went on their work assignments at 7:00 a.m. He also wanted to inquire about his job.
 - b) After the crews left, Supervisor 1 asked him to come up to the office. When he got there Supervisor 1 and Supervisor 2 put papers in front of him and told him to sign them. He believes they were the same COBRA papers he received in the mail earlier. He felt intimidated by the situation so he said he wanted his attorney to review them before he signed them.
- 7) Regarding the COBRA notices that Complainant received, the following information is provided, in part, on those notices:
- a) "This certificate provides evidence of your prior health coverage. You may need to furnish this certificate if you become eligible under a group health plan that excludes coverage for certain medical conditions that you have before you enroll..." "Date coverage ended: December 21, 2007" (See form attached)

- b) Letter dated January 3, 2008: "This letter is providing information regarding the loss of your group health insurance coverage...as of December 21, 2007. Qualified beneficiaries have until 3/03/2008 with a postmark date to apply for COBRA continuation...". (See attached)
 - c) A third letter entitled "Notice of Live Insurance Conversion Privilege and Request for Application" states, in part "...As you separated from the company on December 21, 2007, your Group Insurance has been discontinued...". The form goes on to direct Complainant how he may convert his Group Live Insurance to an individual policy. (See attached.)
- 8) Respondent provides the following regarding the terms "separation" and "termination" as used by the Company and how those terms apply in Complainant's situation:
- a) A "separation" has a broader use and occurs anytime an employee stops actively working for the company. This includes quits, suspensions, layoffs, leaves of absence, terminations, discharges and miscellaneous reasons.
 - b) A "termination," which is a subset of separation, occurs anytime an employee is discharged or has been laid off or on a leave of absence for more than one year.
 - c) Complainant was not terminated but rather separated on a Leave of Absence due to sickness and is eligible for rehire. The effective date of any separation is always the last day the employee worked – in this case December 21, 2008. The "action" date is the date when the home office is notified of the separation and it is entered into the computer.
- 9) Regarding the Separation Notice² that Respondent has on file for Complainant, the following information is noted:
- a) The form indicates that Complainant is on a leave of absence due to sickness (seniority retained).
 - b) Was an exit interview conducted? Answer: No
 - c) Is employee eligible for rehire? Yes
 - d) Under the "Remarks" section, it states, "Hank had called out sick his last day before time off around the holidays. During that time he had a heart

² The Separation Notice is an internal document. Complainant did not see this document until after he filed his Charge of Discrimination with the Maine Human Rights Commission and it was provided as part of Respondent's Answers to the Charge.

attack and went into hospital for emergency surgery. At this time a return date is not known.”

- e) Another Separation Notice form indicates that the effective date of separation was December 21, 2007.
- 10) Complainant reiterates that he was never told to let the company know when he was able to return to work. He also denies that he ever said that he would probably never be able to work as a Water Meter Installer again.
- 11) Respondent provides the following comparative evidence:
 - a) A list of six employees (including Complainant) who went on a leave of absence from July 2006 until October 2008. That list reveals that two of the employees listed were not enrolled in the health insurance program and, therefore, did not receive COBRA paperwork. The remaining four employees – including Complainant – received COBRA paperwork. Of the six employees listed, four returned to work – including two that had received COBRA paperwork.
- 12) Additional information provided:
 - a) Complainant's job duties were assumed by co-workers. No one was hired to assume his position.
 - b) Respondent's employee manual (page 41) states, in part, “Upon returning from approved leave of absence granted as a result of an employee's own serious health condition, an employee **must** present written medical certification from his or her medical care provider stating that he or she is able to perform the essential functions of their job with or without reasonable accommodation. At that time, the Company will place the employee in his or her former position. In the event the former position is not available, the employee will be placed in an equivalent position with equivalent compensation and benefits.”

V. ANALYSIS:

- 1) The Maine Human Rights Act provides that the Commission or its delegated investigator “shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 M.R.S.A. § 4612(1)(B). The Commission interprets the “reasonable grounds” standard to mean that there is at least an even chance of Complainant prevailing in a civil action. More particularly, “reasonable grounds” exists when there is enough admissible evidence, or there is reason to believe that formal litigation discovery will lead to enough admissible evidence, so that there is at least an even chance of

- Complainant proving in court that unlawful discrimination occurred.
Complainant must prove unlawful discrimination in a civil action by a "fair preponderance of the evidence." 5 M.R.S.A. § 4631.
- 2) The Maine Human Rights Act provides, in part, that it is unlawful employment discrimination to terminate an employee because of physical or mental disability. *See* 5 M.R.S.A. § 4572(1)(A).
 - 3) Here, Complainant, Complainant, alleges that Respondent, terminated his employment because of his physical disability.
 - 4) Respondent, denied the allegation of discrimination and states that Complainant was never terminated and that his current status is leave of absence due to sickness. They state that he is eligible for rehire.
 - 5) Because there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).
 - 6) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) he belonged to a protected class, (2) he performed his job satisfactorily, (3) his employer took an adverse employment decision against him, and (4) his employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261.
 - 7) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. *See id.* Complainant's burden may be met either with affirmative evidence of pretext or by the strength of Complainant's evidence of unlawful discriminatory motive. *See City of Auburn*, 408 A.2d at 1262, 1267-68.
 - 8) In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.

- 9) Here, Complainant is unable to establish a prima-facie case because even though he is a person with a physical disability (heart condition), he performed his job duties satisfactorily, and the Respondent continued to have his job duties performed, he has not established that he was terminated from employment.
- 10) Even if one were to assume that Complainant has met his prima-facie burden, Complainant has not demonstrated that Respondent's reason was false or irrelevant and that unlawful discrimination has occurred, with reasoning as follows:
 - a) First and foremost, Respondent provided names of six employees (including Complainant) who went out on leave of absence since July 2006 and four have returned to work, including two that had received the same COBRA paperwork that Complainant received. Respondent provides clear evidence that Complainant was not terminated and was sent the COBRA paperwork in order that he could apply for insurance until he was able to return to work. They credibly state that since Complainant was an hourly employee who had been with the company less than one year, he was not eligible for short term or long term disability, therefore, the only means available to Complainant to continue his benefits was through COBRA.
 - b) In Complainant's defense, when reading the COBRA paperwork sent to him, it is understandable how he would be upset at receiving such paperwork especially since there was no accompanying information putting in writing that he should let Respondent know when he was cleared to return to work. The forms clearly indicate that he has been "separated" from employment and there was no written documentation provided to Complainant from the Respondent informing him that he was considered on a leave of absence.
 - c) The copy of the Separation Notice provided to the Commission by Respondent shows that Complainant was on a Leave of Absence and that "At this time a return date is not known." This indicates that Complainant has not been terminated and that they simply did not – at that point in time – have a return date. Unfortunately, since the "Separation Notice" is an internal document and Complainant did not have the benefit of having received that paperwork, he would not – at the time he received the COBRA paperwork – have known that he was considered on a Leave of Absence and assumed from the wording of the COBRA paperwork that he had been terminated.
 - d) Having said that, Supervisor 1's testimony that he informed Complainant that he should let him know when he was cleared to return to work is more credible. Complainant provided testimony (Development of Facts, 5C) that "it was clear from the paperwork he received and the attitudes of

Supervisor 1 and Supervisor 2 that he was done with Respondent” (emphasis added). In further testimony, he states that he called Supervisor 1 after receiving the paperwork and was told he was all done with the company. This seems rather contradictory. He either perceived from Supervisor 1’s “attitude” that he was done or he was “told” he was all done.

Also, it seems odd that if Complainant was actually told by Supervisor 1 that he was terminated - when Complainant called to inquire about the COBRA letters - that he would then go into the office to thank everyone for the flowers.

- e) Complainant admits that he has not provided clearance that he is able to return to work. While he provides two reasons for not doing so (he thought he was already fired and since he had lost his insurance, he could not afford to do so), Respondent cannot be faulted for not bringing him back to work if he fails to provide clearance that he is able to return.
- f) Respondent’s information states that Complainant was cleared to return to work on January 15, 2008 but never contacted them. Complainant is credible that he was not cleared to return to work on January 15, 2008. Given that he had quadruple bypass surgery on December 27, 2007, it is unlikely that he would have been cleared to return to work in less than three weeks.

VI. RECOMMENDATION:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **No Reasonable Grounds** to believe that the Respondent, terminated Complainant, Complainant’s, employment because of his physical disability; and
- 2) The case should be dismissed in accordance with 5 M.R.S.A. ss4612(2).

Patricia E. Ryan, Executive Director

Sheila P. Pierce, Field Investigator